

The Honorable Robert S. Lasnik

UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

DWIGHT G. SHAW, individually and on behalf  
of a class of similarly situated individuals,

Plaintiffs,

v.

CELLCO PARTNERSHIP, a Delaware General  
partnership d/b/a Verizon Wireless, et al,

Defendants.

Case No. CV10-0184 RSL

**DEFENDANTS SNACKABLE  
MEDIA, LLC AND PREDICTO  
MOBILE, LLC'S ANSWER AND  
AFFIRMATIVE DEFENSES TO  
COMPLAINT**

Defendants Snackable Media, LLC ("Snackable") and Predicto Mobile, LLC ("Predicto")  
(collectively "Defendants"), by and through their counsel, John W. Phillips and Phillips Law  
Group, PLLC, answer Plaintiff's Complaint for Injunctive and Declaratory Relief, Damages and  
Rescission ("Complaint") upon information and belief as follows:

**I. INTRODUCTION**

1.1 Defendants deny the allegations contained in paragraph 1.1 of the Complaint.

1.2 Defendants are without knowledge or information sufficient to form a belief as to  
the truth of the allegations contained in paragraph 1.2 of the Complaint, and therefore deny the  
same.

**II. PARTIES**

2.1 Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 2.1 of the Complaint, and therefore deny the same.

2.2 Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 2.2 of the Complaint, and therefore deny the same.

2.3 Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 2.3 of the Complaint, and therefore deny the same.

2.4 Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 2.4 of the Complaint, and therefore deny the same.

2.5 Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations concerning co-defendant OpenMarket Inc. ("OpenMarket") contained in paragraph 2.5 of the Complaint, and therefore deny the same. To the extent that the allegations contained in paragraph 2.5 relate to Defendants, Defendants deny such allegations.

2.6 Defendants admit that Snackable Media is a Nevada limited liability company with its principal place of business in New York. Defendants deny the remaining allegations contained in paragraph 2.6.

2.7 Defendants admit that Predicto is a Delaware limited liability company. The allegation in paragraph 2.7 relating to where Predicto conducts business calls for a conclusion of law to which no response is required. To the extent that a response is required, Defendants deny such allegation. Defendants deny the remaining allegations contained in paragraph 2.7.

**III. JURISDICTION AND VENUE**

3.1 The allegations contained in paragraph 3.1 call for conclusions of law to which no response is required. To the extent that a response is required, Defendants deny the allegations contained in paragraph 3.1.

3.2 The allegations contained in paragraph 3.2 call for a conclusion of law to which no response is required. To the extent that a response is required, Defendants deny the allegations contained in paragraph 3.2.

**IV. STATEMENT OF THE CASE**

**A. Verizon Uses Negative Opt-Out Sales Practices That Set Consumers Up to Be Billed for Unauthorized Charges**

4.1 Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 4.1 of the Complaint, and therefore deny the same.

4.2 Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 4.2 of the Complaint, and therefore deny the same.

4.3 Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 4.3 of the Complaint, and therefore deny the same.

4.4 Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 4.4 of the Complaint, and therefore deny the same.

4.5 Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 4.5 of the Complaint, and therefore deny the same.

4.6 Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 4.6 of the Complaint, and therefore deny the same.

1           4.7     Defendants are without knowledge or information sufficient to form a belief as to  
2 the truth of the allegations contained in paragraph 4.7 of the Complaint, and therefore deny the  
3 same.

4           4.8     Defendants are without knowledge or information sufficient to form a belief as to  
5 the truth of the allegations contained in paragraph 4.8 of the Complaint, and therefore deny the  
6 same.

7           4.9     Defendants are without knowledge or information sufficient to form a belief as to  
8 the truth of the allegations contained in paragraph 4.9 of the Complaint, and therefore deny the  
9 same.

10          4.10    Defendants are without knowledge or information sufficient to form a belief as to  
11 the truth of the allegations contained in paragraph 4.10 of the Complaint, and therefore deny the  
12 same.

13          4.11    Defendants are without knowledge or information sufficient to form a belief as to  
14 the truth of the allegations contained in paragraph 4.11 of the Complaint, and therefore deny the  
15 same.

16 **B.     The Mobile Content Industry**

17          4.12    To the extent that the allegations contained in paragraph 4.12 of the Complaint  
18 relate to Defendants, Defendants deny the allegations contained in paragraph 4.12.

19          4.13    To the extent that the allegations contained in paragraph 4.13 of the Complaint  
20 relate to Defendants, Defendants deny the allegations contained in paragraph 4.13.

21          4.14    To the extent that the allegations contained in paragraph 4.14 of the Complaint  
22 relate to Defendants, Defendants deny the allegations contained in paragraph 4.14.

23          4.15    Defendants are without knowledge or information sufficient to form a belief as to  
24 the truth of the allegations contained in paragraph 4.15 of the Complaint, and therefore deny the  
25 same.

1           4.16 Defendants are without knowledge or information sufficient to form a belief as to  
2 the truth of the allegations contained in paragraph 4.16 of the Complaint, and therefore deny the  
3 same.

4           4.17 Defendants are without knowledge or information sufficient to form a belief as to  
5 the truth of the allegations contained in paragraph 4.17 of the Complaint, and therefore deny the  
6 same.

7           4.18 Defendants are without knowledge or information sufficient to form a belief as to  
8 the truth of the allegations contained in paragraph 4.18 of the Complaint, and therefore deny the  
9 same.

10          4.19 Defendants are without knowledge or information sufficient to form a belief as to  
11 the truth of the allegations contained in paragraph 4.19 of the Complaint, and therefore deny the  
12 same.

13          4.20 Defendants are without knowledge or information sufficient to form a belief as to  
14 the truth of the allegations contained in paragraph 4.20 of the Complaint, and therefore deny the  
15 same.

16          4.21 To the extent that the allegations contained in paragraph 4.21 of the Complaint  
17 relate to Defendants, Defendants deny the allegations contained in paragraph 4.21.

18 **C. Defendants Perpetuate a Billing and Collection System That Facilitates,**  
19 **Rather than Protects Against, Mistaken and Fraudulent Billing**

20          4.22 To the extent that the allegations contained in paragraph 4.22 of the Complaint  
21 relate to Defendants, Defendants deny the allegations contained in paragraph 4.22.

22          4.23 To the extent that the allegations contained in paragraph 4.23 of the Complaint  
23 relate to Defendants, Defendants deny the allegations contained in paragraph 4.23.

24          4.24 To the extent that the allegations contained in paragraph 4.24 of the Complaint  
25 relate to Defendants, Defendants deny the allegations contained in paragraph 4.24.

1           4.25    To the extent that the allegations contained in paragraph 4.25 of the Complaint  
2 relate to Defendants, Defendants deny the allegations contained in paragraph 4.25.

3           4.26    To the extent that the allegations contained in paragraph 4.26 of the Complaint  
4 relate to Defendants, Defendants deny the allegations contained in paragraph 4.26.

5           4.27    To the extent that the allegations contained in paragraph 4.27 of the Complaint  
6 relate to Defendants, Defendants deny the allegations contained in paragraph 4.27.

7           4.28    To the extent that the allegations contained in paragraph 4.28 of the Complaint  
8 relate to Defendants, Defendants deny the allegations contained in paragraph 4.28.

9           4.29    To the extent that the allegations contained in paragraph 4.29 of the Complaint  
10 relate to Defendants, Defendants deny the allegations contained in paragraph 4.29.

11          4.30    Defendants are without knowledge or information sufficient to form a belief as to  
12 the truth of the allegations contained in paragraph 4.30 of the Complaint, and therefore deny the  
13 same.

14          4.31    To the extent that the allegations contained in paragraph 4.31 of the Complaint  
15 relate to Defendants, Defendants deny the allegations contained in paragraph 4.31.

16 **D.     Snackable and Predicto's Unfair and Deceptive Conduct**

17          4.32    Defendants deny the allegations contained in paragraph 4.32 of the Complaint.

18          4.33    Defendants are without knowledge or information sufficient to form a belief as to  
19 the truth of the allegations contained in paragraph 4.33 of the Complaint, and therefore deny the  
20 same.

21          4.34    Defendants deny the allegations contained in paragraph 4.34 of the Complaint.

22          4.35    Defendants deny the allegations contained in paragraph 4.35 of the Complaint.

23          4.36    Defendants are without knowledge or information sufficient to form a belief as to  
24 the truth of the allegations contained in paragraph 4.36 of the Complaint, and therefore deny the  
25 same.  
26  
27

1           4.37 Defendants are without knowledge or information sufficient to form a belief as to  
2 the truth of the allegations contained in paragraph 4.37 of the Complaint, and therefore deny the  
3 same.

4 **E. OpenMarket's Unfair and Deceptive Conduct**

5           4.38 Defendants deny the allegations contained in paragraph 4.38 of the Complaint.

6           4.39 To the extent that the allegations contained in paragraph 4.39 of the Complaint  
7 relate to Defendants, Defendants deny the allegations contained in paragraph 4.39.

8           4.40 To the extent that the allegations contained in paragraph 4.40 of the Complaint  
9 relate to Defendants, Defendants deny the allegations contained in paragraph 4.40.

10 **F. Verizon's Additional Unfair and Deceptive Conduct**

11           4.41 To the extent that the allegations contained in paragraph 4.41 of the Complaint  
12 relate to Defendants, Defendants deny the allegations contained in paragraph 4.41.

13           4.42 Defendants are without knowledge or information sufficient to form a belief as to  
14 the truth of the allegations contained in paragraph 4.42 of the Complaint, and therefore deny the  
15 same.

16           4.43 To the extent that the allegations contained in paragraph 4.43 of the Complaint  
17 relate to Defendants, Defendants deny the allegations contained in paragraph 4.43.

18           4.44 Defendants are without knowledge or information sufficient to form a belief as to  
19 the truth of the allegations contained in paragraph 4.44 of the Complaint, and therefore deny the  
20 same.

21           4.45 Defendants are without knowledge or information sufficient to form a belief as to  
22 the truth of the allegations contained in paragraph 4.45 of the Complaint, and therefore deny the  
23 same.

24           4.46 Defendants are without knowledge or information sufficient to form a belief as to  
25 the truth of the allegations contained in paragraph 4.46 of the Complaint, and therefore deny the  
26 same.

1           4.47 Defendants are without knowledge or information sufficient to form a belief as to  
2 the truth of the allegations contained in paragraph 4.47 of the Complaint, and therefore deny the  
3 same.

4           4.48 To the extent that the allegations contained in paragraph 4.48 of the Complaint  
5 relate to Defendants, Defendants deny the allegations contained in paragraph 4.48.

6           4.49 To the extent that the allegations contained in paragraph 4.49 of the Complaint  
7 relate to Defendants, Defendants deny the allegations contained in paragraph 4.49.

8           4.50 To the extent that the allegations contained in paragraph 4.50 of the Complaint  
9 relate to Defendants, Defendants deny the allegations contained in paragraph 4.50.

10 **G. The Facts Relating to Named Plaintiff**

11           4.51 Defendants are without knowledge or information sufficient to form a belief as to  
12 the truth of the allegations contained in paragraph 4.51 of the Complaint, and therefore deny the  
13 same.

14           4.52 Defendants are without knowledge or information sufficient to form a belief as to  
15 the truth of the allegations contained in paragraph 4.52 of the Complaint, and therefore deny the  
16 same.

17           4.53 Defendants are without knowledge or information sufficient to form a belief as to  
18 the truth of the allegations contained in paragraph 4.53 of the Complaint, and therefore deny the  
19 same.

20           4.54 Defendants are without knowledge or information sufficient to form a belief as to  
21 the truth of the allegations contained in paragraph 4.54 of the Complaint, and therefore deny the  
22 same.

23           4.55 Defendants are without knowledge or information sufficient to form a belief as to  
24 the truth of the allegations contained in paragraph 4.55 of the Complaint, and therefore deny the  
25 same.



1           4.56 Defendants are without knowledge or information sufficient to form a belief as to  
2 the truth of the allegations contained in paragraph 4.56 of the Complaint, and therefore deny the  
3 same.

4           4.57 Defendants are without knowledge or information sufficient to form a belief as to  
5 the truth of the allegations contained in paragraph 4.57 of the Complaint, and therefore deny the  
6 same.

7           4.58 Defendants are without knowledge or information sufficient to form a belief as to  
8 the truth of the allegations contained in paragraph 4.58 of the Complaint, and therefore deny the  
9 same.

10          4.59 Defendants are without knowledge or information sufficient to form a belief as to  
11 the truth of the allegations contained in paragraph 4.59 of the Complaint, and therefore deny the  
12 same.

13          4.60 Defendants are without knowledge or information sufficient to form a belief as to  
14 the truth of the allegations contained in paragraph 4.60 of the Complaint, and therefore deny the  
15 same.

16          4.61 Defendants are without knowledge or information sufficient to form a belief as to  
17 the truth of the allegations contained in paragraph 4.61 of the Complaint, and therefore deny the  
18 same.

19          4.62 Defendants are without knowledge or information sufficient to form a belief as to  
20 the truth of the allegations contained in paragraph 4.62 of the Complaint, and therefore deny the  
21 same.

22          4.63 Defendants are without knowledge or information sufficient to form a belief as to  
23 the truth of the allegations contained in paragraph 4.63 of the Complaint, and therefore deny the  
24 same.

25          4.64 Defendants are without knowledge or information sufficient to form a belief as to  
26 the truth of the allegations contained in paragraph 4.64 of the Complaint, and therefore deny the  
27 same.

1           4.65 Defendants are without knowledge or information sufficient to form a belief as to  
2 the truth of the allegations contained in paragraph 4.65 of the Complaint, and therefore deny the  
3 same.

4           4.66 To the extent that the allegations contained in paragraph 4.66 of the Complaint  
5 relate to Defendants, Defendants deny the allegations contained in paragraph 4.66.

6                                   **V. CLASS ACTION ALLEGATIONS**

7           5.1 The allegations contained in paragraph 5.1 of the Complaint call for a conclusion  
8 of law to which no response is required. To the extent that a response is required, Defendants  
9 deny the allegations contained in paragraph 5.1.

10          5.2 The allegations contained in paragraph 5.2 of the Complaint call for a conclusion  
11 of law to which no response is required. To the extent that a response is required, Defendants  
12 deny the allegations contained in paragraph 5.2.

13          5.3 Paragraph 5.3 of the Complaint does not contain any allegations of fact that can  
14 be admitted or denied.

15          5.4 The allegations contained in paragraph 5.4 of the Complaint call for a conclusion  
16 of law to which no response is required. To the extent that a response is required, Defendants  
17 deny the allegations contained in paragraph 5.4.

18          5.5 The allegations contained in paragraph 5.5 of the Complaint call for a conclusion  
19 of law to which no response is required. To the extent that a response is required, Defendants  
20 deny the allegations contained in paragraph 5.5.

21          5.6 Defendants deny the allegations contained in paragraph 5.6 of the Complaint.

22          5.7 Defendants deny the allegations contained in paragraph 5.7 of the Complaint.

23          5.8 Defendants deny the allegations contained in paragraph 5.8 of the Complaint.

24          5.9 The allegations contained in paragraph 5.9 of the Complaint call for a conclusion  
25 of law to which no response is required. To the extent that a response is required, Defendants  
26 deny the allegations contained in paragraph 5.9.

1           5.10    The allegations contained in paragraph 5.10 of the Complaint (including  
2 subsections 5.10.1 through 5.10.4) call for a conclusion of law to which no response is required.  
3 To the extent that a response is required, Defendants deny the allegations contained in paragraph  
4 5.10.

5           5.11.   The allegations contained in paragraph 5.11 of the Complaint (including  
6 subsections 5.11.1 through 5.11.3) call for a conclusion of law to which no response is required.  
7 To the extent that a response is required, Defendants deny the allegations contained in paragraph  
8 5.11.

9           5.12    The allegations contained in paragraph 5.12 of the Complaint (including  
10 subsections 5.12.1 through 5.12.2) call for a conclusion of law to which no response is required.  
11 To the extent that a response is required, Defendants deny the allegations contained in paragraph  
12 5.12.

13          5.13    The allegations contained in paragraph 5.13 of the Complaint call for a conclusion  
14 of law to which no response is required. To the extent that a response is required, Defendants  
15 deny the allegations contained in paragraph 5.13.

16          5.14    Defendants deny the allegations contained in paragraph 5.14 of the Complaint.

17          5.15    The allegations contained in paragraph 5.15 of the Complaint call for a conclusion  
18 of law to which no response is required. To the extent that a response is required, Defendants  
19 deny the allegations contained in paragraph 5.15.

20          5.16    The allegations contained in paragraph 5.16 of the Complaint call for a conclusion  
21 of law to which no response is required. To the extent that a response is required, Defendants  
22 deny the allegations contained in paragraph 5.16.

23          5.17    Defendants deny the allegations contained in paragraph 5.17 of the Complaint.

24          5.18    To the extent that the allegations contained in paragraph 5.18 of the Complaint  
25 relate to Defendants, Defendants deny the allegations contained in paragraph 5.18.

**VI. FIRST CAUSE OF ACTION**

**(Unjust Enrichment Against All Defendants on Behalf of Plaintiff and the Verizon Washington Class, the OpenMarket Subclass and the Snackable Class)**

6.1 In response to the allegations set forth in paragraph 6.1 of the Complaint, Defendants repeat and reallege their responses to paragraphs 1.1 through 5.18 of the Complaint as if fully set forth herein.

6.2 Defendants deny the allegations contained in paragraph 6.2 of the Complaint.

6.3 Defendants deny the allegations contained in paragraph 6.3 of the Complaint.

6.4 Defendants deny the allegations contained in paragraph 6.4 of the Complaint.

6.5 Defendants deny the allegations contained in paragraph 6.5 of the Complaint.

**VII. SECOND CAUSE OF ACTION**

**(Violation of Washington Consumer Protection Act, RCW 19.86, et seq. Against All Defendants on Behalf of Plaintiff and Verizon Washington Class, the OpenMarket Subclass and the Snackable Class)**

7.1 In response to the allegations set forth in paragraph 7.1 of the Complaint, Defendants repeat and reallege their responses to paragraphs 1.1 through 6.5 of the Complaint as if fully set forth herein.

7.2 To the extent that the allegations contained in paragraph 7.2 of the Complaint relate to Defendants, Defendants deny the allegations contained in paragraph 7.2.

7.3 Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 7.3 of the Complaint, and therefore deny the same.

7.4 Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 7.4 of the Complaint, and therefore deny the same.

7.5 Defendants deny the allegations contained in paragraph 7.5 of the Complaint.

7.6 To the extent that the allegations contained in paragraph 7.6 of the Complaint relate to Defendants, Defendants deny the allegations contained in paragraph 7.6.

1           7.7     To the extent that the allegations contained in paragraph 7.7 of the Complaint  
2 relate to Defendants, Defendants deny the allegations contained in paragraph 7.7.

3           7.8     To the extent that the allegations contained in paragraph 7.8 of the Complaint  
4 relate to Defendants, Defendants deny the allegations contained in paragraph 7.8.

5           7.9     Defendants deny the allegations contained in paragraph 7.9 of the Complaint.

6           7.10    Defendants deny the allegations contained in paragraph 7.10 of the Complaint.

7           7.11    The allegations contained in paragraph 7.11 of the Complaint call for a conclusion  
8 of law to which no response is required. To the extent that a response is required, Defendants  
9 deny the allegations contained in paragraph 7.11.

10                           **VIII.   THIRD CAUSE OF ACTION**  
11           **(Declaratory Relief Under The Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.***  
12           **Against All Defendants on Behalf of Plaintiff and the Verizon Nationwide Class, the**  
                              **OpenMarket Subclass and the Snackable Class)**

13           8.1     In response to the allegations set forth in paragraph 8.1 of the Complaint,  
14 Defendants repeat and reallege their responses to paragraphs 1.1 through 7.11 of the Complaint  
15 as if fully set forth herein.

16           8.2     To the extent that the allegations contained in paragraph 8.2 of the Complaint  
17 relate to Defendants, Defendants deny the allegations contained in paragraph 8.2.

18           8.3     Defendants deny the allegations contained in paragraph 8.3 of the Complaint.

19                           **IX.     FOURTH CAUSE OF ACTION**  
20           **(Breach of Contract Against Verizon on Behalf of Plaintiff and the**  
21           **Verizon Washington Class)**

22           9.1     In response to the allegations set forth in paragraph 9.1 of the Complaint,  
23 Defendants repeat and reallege their responses to paragraphs 1.1 through 8.3 of the Complaint as  
24 if fully set forth herein.

25           9.2     Defendants are without knowledge or information sufficient to form a belief as to  
26 the truth of the allegations contained in paragraph 9.2 of the Complaint, and therefore deny the  
27 same.

1           9.3     Defendants are without knowledge or information sufficient to form a belief as to  
2 the truth of the allegations contained in paragraph 9.3 of the Complaint, and therefore deny the  
3 same.

4           9.4     Defendants are without knowledge or information sufficient to form a belief as to  
5 the truth of the allegations contained in paragraph 9.4 of the Complaint, and therefore deny the  
6 same.

7           9.5     Defendants are without knowledge or information sufficient to form a belief as to  
8 the truth of the allegations contained in paragraph 9.5 of the Complaint, and therefore deny the  
9 same.

10          9.6     Defendants are without knowledge or information sufficient to form a belief as to  
11 the truth of the allegations contained in paragraph 9.6 of the Complaint, and therefore deny the  
12 same.

13          9.7     The allegations contained in paragraph 9.7 of the Complaint call for a conclusion  
14 of law to which no response is required. To the extent that a response is required, Defendants  
15 deny the allegations contained in paragraph 9.7.

16          9.8     The allegations contained in paragraph 9.8 of the Complaint call for a conclusion  
17 of law to which no response is required. To the extent that a response is required, Defendants  
18 deny the allegations contained in paragraph 9.8.

19  
20                   **X.     FIFTH CAUSE OF ACTION**  
21                   **(Violation of the Federal Communications Act, 47 U.S.C. § 201 Against Verizon on Behalf**  
22                   **of Plaintiff and the Verizon Nationwide Class)**

23          10.1     In response to the allegations set forth in paragraph 10.1 of the Complaint,  
24 Defendants repeat and reallege their responses to paragraphs 1.1 through 9.8 of the Complaint as  
25 if fully set forth herein.

26          10.2     The allegations contained in paragraph 10.2 of the Complaint call for a conclusion  
27 of law to which no response is required. To the extent that a response is required, Defendants  
deny the allegations contained in paragraph 10.2.

10.3 The allegations contained in paragraph 10.3 of the Complaint call for a conclusion of law to which no response is required. To the extent that a response is required, Defendants deny the allegations contained in paragraph 10.3.

10.4 The allegations contained in paragraph 10.4 of the Complaint call for a conclusion of law to which no response is required. To the extent that a response is required, Defendants deny the allegations contained in paragraph 10.4.

10.5 The allegations contained in paragraph 10.5 of the Complaint call for a conclusion of law to which no response is required. To the extent that a response is required, Defendants deny the allegations contained in paragraph 10.5.

**XI. SIXTH CAUSE OF ACTION**  
**(Tortious Interference with a Business Expectancy Against OpenMarket, Snackable and Predict on Behalf of the Snackable Verizon Subclass and OpenMarket Subclass)**

11.1 In response to the allegations set forth in paragraph 11.1 of the Complaint, Defendants repeat and reallege their responses to paragraphs 1.1 through 10.5 of the Complaint as if fully set forth herein.

11.2 Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 11.2 of the Complaint, and therefore deny the same.

11.3 To the extent that the allegations contained in paragraph 11.3 of the Complaint relate to Defendants, Defendants deny the allegations contained in paragraph 11.3.

11.4 To the extent that the allegations contained in paragraph 11.4 of the Complaint relate to Defendants, Defendants deny the allegations contained in paragraph 11.4.

11.5 Defendants deny the allegations contained in paragraph 11.5 of the Complaint.

**XII. PLAINTIFF'S REQUEST FOR RELIEF**

Answering Section XII of the Complaint, entitled "Request for Relief," and all of its subparts, Defendants deny that Plaintiff, or any other person, is entitled to any relief sought in the Complaint or any other relief sought in this action. Defendants further deny all allegations,

1 claims, and other statements (including headings) contained in the Complaint unless specifically  
2 admitted herein.

3 **AFFIRMATIVE DEFENSES**

4 By way of further answer and as affirmative defenses, Defendants, upon information and  
5 belief, state and allege as follows:

6 **First Affirmative Defense**  
7 **(Failure to State a Claim)**

8 1. Some or all of Plaintiff's claims fail to state a cause of action for which relief may  
9 be granted.

10 **Second Affirmative Defense**  
11 **(Laches, Estoppel, Waiver)**

12 2. Plaintiff's claims and the claims of putative class members are barred, in whole or  
13 in part, by the doctrines of laches, estoppel, and waiver.

14 **Third Affirmative Defense**  
15 **(Reasonableness and Good Faith)**

16 3. Defendants acted reasonably and in good faith at all times material to Plaintiff's  
17 claims. Accordingly, Plaintiff and putative class members are barred from any recovery from  
18 Defendants in this action, or any recovery from Defendants is limited.

19 **Fourth Affirmative Defense**  
20 **(Statute of Limitations)**

21 4. Plaintiff's claims and the claims of putative class members are barred, in whole or  
22 in part, by applicable statutes of limitation.

23 **Fifth Affirmative Defense**  
24 **(Voluntary Payment Doctrine)**

25 5. Plaintiff's claims and the claims of putative class members are barred, in whole or  
26 in part, by the voluntary payment doctrine.  
27



**Sixth Affirmative Defense**  
**(Promise Not to Bring Class Action)**

6. Plaintiff's claims and the claims of putative class members are barred, in whole or in part, by their promise not to assert or maintain a claim nor to join an action on a class-wide basis against Defendants.

**Seventh Affirmative Defense**  
**(No Causation)**

7. The Complaint and each purported claim for relief are barred because Plaintiff and putative class members' alleged damages, if any, were not caused by Defendants.

**Eighth Affirmative Defense**  
**(Election of Remedies)**

8. Plaintiff's claims and the claims of putative class members are barred, in whole or in part, by the doctrine of election of remedies.

**Ninth Affirmative Defense**  
**(Unclean Hands)**

9. Plaintiff's claims and the claims of putative class members are barred, in whole or in part, by the equitable doctrine of unclean hands.

**Tenth Affirmative Defense**  
**(Equitable Estoppel)**

10. Plaintiff's claims and the claims of putative class members are barred, in whole or in part, by the doctrine of equitable estoppel by reason of their acts, omissions, representations, and courses of conduct, upon which Defendants detrimentally relied.

**Eleventh Affirmative Defense**  
**(Performance Excused or Prevented)**

11. Plaintiff's claims and the claims of putative class members are barred because Defendants' performance of their obligations, if any, was excused or prevented by Plaintiff's and putative class members' conduct and/or prior material breaches of their obligations.

**Twelfth Affirmative Defense**  
**(Failure to Mitigate Damages)**

12. Plaintiff's claims and the claims of putative class members are barred or reduced because Plaintiff and putative class members failed to mitigate or reasonably attempt to mitigate their damages, if any, as required by law.

**Thirteenth Affirmative Defense**  
**(Lack of Injury/Damages)**

13. Plaintiff's claims and the claims of putative class members are barred because they have not suffered any injury or damage (monetary or otherwise) as a result of any action taken by Defendants.

**Fourteenth Affirmative Defense**  
**(Proper Party)**

14. Mr. Dwight Shaw is not a proper party to this action.

**Fifteenth Affirmative Defense**  
**(Economic Loss)**

15. Plaintiff's claims and the claims of putative class members are barred, in whole or in part, by the economic loss doctrine.

**Sixteenth Affirmative Defense**  
**(Mootness)**

16. Plaintiff's claims and the claims of putative class members are barred, in whole or in part, because they are moot.

**Seventeenth Affirmative Defense**  
**(No Standing)**

17. Plaintiff's claims and the claims of putative class members are barred, in whole or in part, because they lack standing to assert their claims against Defendants.

**Eighteenth Affirmative Defense**  
**(Class Action Inappropriate)**

18. Defendants affirmatively state that this action is not properly brought as a class action pursuant to Federal Rule of Civil Procedure 23.

**Nineteenth Affirmative Defense**  
**(Individual Actions Feasible)**

19. Defendants affirmatively state that this action is not properly brought as a class action because Mr. Dwight Shaw and most if not all of the putative class members can prosecute individual actions.

**Twentieth Affirmative Defense**  
**(Ratification/Consent)**

20. Plaintiff's claims and the claims of putative class members are barred, in whole or in part, because they consented to, ratified and/or approved the conduct of which they now complain.

**Twenty-First Affirmative Defense**  
**(Primary Jurisdiction)**

21. Plaintiff's claims and the claims of putative class members are barred by the doctrine of primary jurisdiction.

**Twenty-Second Affirmative Defense**  
**(Failure to Arbitrate)**

22. Plaintiff's claims and the claims of putative class members are barred by their failure to arbitrate their claims pursuant to any applicable provisions of their service agreements, if any.

**Twenty-Third Affirmative Defense**  
**(Failure to Give Adequate Notice and Opportunity to Cure)**

23. Plaintiff's claims and the claims of putative class members are barred for failure to give adequate notice and opportunity to cure.

**Twenty-Fourth Affirmative Defense**  
**(Accord and Satisfaction)**

24. Plaintiff's claims and the claims of putative class members are barred, in whole or in part, based on the doctrine of accord and satisfaction.

**Twenty-Fifth Affirmative Defense**  
**(Release)**

25. Plaintiff's and putative class member's actions constitute a full release of any and all claims they have or may have had against Defendants.

**Twenty-Sixth Affirmative Defense**  
**(Damages Speculative)**

26. The damages sought by Plaintiff and putative class member are barred because the Court lacks any sufficiently certain, non-speculative basis for fashioning the requested damages or other relief.

**Twenty-Seventh Affirmative Defense**  
**(Lack of Irreparable Harm)**

27. All or some of Plaintiff's and putative class members' claims for injunctive relief are barred because Plaintiff and putative class members cannot show that they have suffered or will suffer any irreparable harm from Defendants' actions.

**Twenty-Eighth Affirmative Defense**  
**(Adequacy of Remedy at Law)**

28. The alleged damage or injury suffered by Plaintiff and putative class members, if any, would be adequately compensated by damages.

**Twenty-Ninth Affirmative Defense**  
**(Benefits Realized)**

29. Plaintiff and putative class member have enjoyed the benefits of the products and services which are the subject of the Complaint, and are thereby barred from pursuing one or more of the claims for relief set forth in the Complaint.

**Thirtieth Affirmative Defense**  
**(Comparative Negligence)**

30. The injuries and damages purportedly suffered by Plaintiff and putative class members as alleged in the Complaint, if suffered at all, were ultimately caused and aggravated by the actions of Plaintiff and putative class members. Plaintiff's and putative class members'

1 recovery against Defendants, if any, should therefore be reduced in proportion to Plaintiff's and  
2 putative class members' percentage of negligence, fault or comparative bad faith.

3 **Thirty-First Affirmative Defense**  
4 **(Business Judgment/Lawful Practice)**

5 31. The challenged conduct by Defendants constituted and constitutes a reasonable  
6 exercise of business judgment which is not forbidden by law.

7 **Thirty-Second Affirmative Defense**  
8 **(Intervening/Superseding Causes)**

9 32. Any loss, injury, or damage incurred by Plaintiff and putative class members was  
10 proximately caused by the acts of third parties whom Defendants neither controlled nor had the  
11 right to control, and was not proximately caused by any acts, omissions or other conduct of  
12 Defendants or for which Defendants are responsible.

13 **Thirty-Third Affirmative Defense**  
14 **(Assumption of Risk)**

15 33. Plaintiff and putative class members voluntarily assumed the risk of any damages  
16 sustained, and therefore, their claims are barred by the doctrine of assumption of risk.

17 **Thirty-Fourth Affirmative Defense**  
18 **(Misjoinder of Parties)**

19 34. Plaintiff and putative class members have failed to join all necessary and/or  
20 indispensable parties to this action, who are necessary for just adjudication of their claims.

21 **Thirty-Fifth Affirmative Defense**  
22 **(Refund)**

23 35. Plaintiff's claims and the claims of putative class members' claims are barred to  
24 the extent that Plaintiffs and putative class members have been refunded for any charges they  
25 now contend are improper.

26 **Reservation of Right to Assert Additional Defenses and Claims**

27 Defendants have not completed their investigation and discovery regarding the facts and  
claims asserted by Plaintiff. Accordingly, Defendants reserve the right to seek leave of Court to

1 add such additional affirmative defenses as may be necessary based on the ongoing investigation  
2 and discovery, and to assert other defenses, cross-claims, counterclaims, and third-party claims if  
3 and when they become appropriate in this action.

4 **XIII. PRAYER FOR RELIEF**

5 Wherefore, having stated their answer and affirmative defenses, Defendants pray for  
6 relief as follows:

- 7 1. That this lawsuit be dismissed with prejudice;
- 8 2. That this action proceed between the named parties only, and that no class action  
9 be permitted and no class certified under Federal Rule of Civil Procedure 23;
- 10 3. For attorney fees and costs as permitted by law; and
- 11 4. For such other and further relief as the Court deems just and proper.

12 DATED this 12th day of May, 2010.

13 Respectfully submitted,

14 PHILLIPS LAW GROUP, PLLC

15 By: /s/ John W. Phillips  
16 John W. Phillips, WSBA #12185

17 Attorneys for Defendants SNACKABLE MEDIA,  
18 LLC and PREDICTO MOBILE, LLC  
19  
20  
21  
22  
23  
24  
25  
26  
27

CERTIFICATE OF SERVICE

I hereby certify that on May 12, 2010, I caused the foregoing document to be electronically filed with the Clerk of the Court using the CM/ECF system and caused it to be electronically served on all counsel as follows:

Christopher I. Brian  
Nancy A. Pacharzina  
Tousley Brain Stephens PLLC  
1700 Seventh Avenue, Suite 2200  
Seattle, WA 98101

*Attorneys for Plaintiffs*

Charles S. Wright  
Davis Wright Tremaine, LLP  
1201 Third Avenue, Suite 2200  
Seattle, WA 98101

Dan Marmalefsky  
Tiffany Cheung  
Morrison & Foerster  
555 West Fifth Street  
Los Angeles, CA 90013

*Attorneys for Defendant Cellco  
Partnership*

Jeffrey M. Thomas  
Gordon Tilden Thomas & Cordell LLP  
1001 Fourth Ave., Suite 4000  
Seattle, WA 98154

Sanket J. Bulsara  
William Cutler Hale Pickering & Dorr  
399 Park Avenue  
New York, N Y 10022

*Attorneys for Defendant OpenMarket, Inc.*

By: /s/ John W. Phillips